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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 268

SEABOARD AIR LINE RAILROAD COMPANY,
Petitioner,

vs.

SARASOTA-FRUITVILLE DRAINAGE DISTRICT,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. _____

SEABOARD AIR LINE RAILROAD COMPANY,
Petitioner,

vs.

SARASOTA-FRUITVILLE DRAINAGE DISTRICT,
Respondent.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on May 15, 1958.

CITATIONS TO OPINIONS BELOW

The order of the Judge of the United States District Court for the Southern District of Florida granting the respondent's Motion to Dismiss the Complaint of petitioner (R. 15), is printed in Appendix B hereto, *infra,* page B-1. The initial opinion of the Court of Appeals printed in Appendix B hereto *infra,* page B-2, is reported in 251 F.2d 583. The opinion of the Circuit Court of Appeals on rehearing is printed in Appendix B hereto *infra,* page B-17 and is to date unreported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 14, 1958 (R. 42), and is printed in Appendix B hereto, *infra* page B-16. The judgment of the Court of Appeals on the rehearing was entered on May 15 1958 (R. 88), and is printed in Appendix B hereto, *infra* page B-26. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals is unconstitutional because of its erroneous determination of the function of a Federal Court to ascertain the law of the case in the exercise of diversity of citizenship jurisdiction when there is an absence of state law on the point in issue.

2. Whether the Court of Appeals in a case based on the diversity of citizenship jurisdiction correctly exercised its function in determining law when there was an absence of state authority on the point in issue.

3. Whether the Court of Appeals erred in determining that a drainage district in the State of Florida was without power to enter an indemnity agreement.

STATUTES INVOLVED

The statutory provisions involved are the Rules of Decision Act, 28 U. S. C., Section 1652 and Chapter 8558, Laws of Florida 1921, Section 1; Chapter 7897, Laws of Florida 1919, Section 26; Section 298.62, Florida Statutes 1957; and Section 298.22, Florida Statutes 1957.

STATEMENT OF THE CASE

The petitioner, a corporation organized and existing under the laws of the State of Virginia, brought suit against the respondent, a corporation existing under the laws of the State of Florida, on August 6, 1956, in the United States District Court for the Southern District of Florida, Tampa Division, on an agreement entered into in 1925 by the respondent and the petitioner's predecessor in interest. Under the terms of this agreement, the respondent was granted the right to lay and thereafter maintain and use certain culverts beneath the tracks and property of the petitioner, in consideration of the agreement by the respondent to assume all risk of loss, injury or damage to the person and property of the petitioner, and the agreement on the part of the respondent to indemnify and save harmless the petitioner railroad corporation from all loss, damage, cost and expense which the petitioner might sustain growing out of the installation, presence, operation, maintenance or removal of the culverts, or any part thereof. (R. 6-10). This indemnity agreement was the sole consideration received by the petitioner in exchange for its grant of the easement during the entire period which the respondent has enjoyed the use of the property.

This Complaint alleged the existence of the aforesaid agreement and further alleged that a short time prior to December 5, 1953, the respondent undertook to and was engaged in the lowering of ditches in and about the aforementioned culverts adjacent to the embankment supports of the petitioner's railroad tracks and that as a result thereof the road bed gave way and the embankment supporting the railroad tracks was undermined, thereby removing the supports for the petition-

er's railroad tracks. These acts of the respondent caused petitioner's train No. 258, to be derailed and wrecked on December 5, 1953, causing great damage to the petitioner's property and equipment and personal injuries to certain persons, resulting in loss to the petitioner of Twenty Eight Thousand Five Hundred and Ninety-Seven and 15/100 Dollars ($28,597.15). (R. 2-5) for which sum the petitioner demanded judgment. The sum demanded did not consist of interest or costs.

The respondent interposed a motion to dismiss, alleging, *inter alia,* that the respondent is a drainage district organized under the laws of the State of Florida and that neither the respondent nor its officers had any authority to enter into the agreement which was the basis of the Complaint. (R. 12-14).

On January 19, 1957 the District Court granted the respondent's motion to dismiss on the grounds that, the respondent being a drainage district organized and existing under the General Drainage Law of the State of Florida, it had no authority to bind itself as an indemnitor for consideration of the acquisition of an easement in land, and could not be held liable in tort.

The petitioner appealed and the United States Court of Appeals for the Fifth Circuit, with a judge dissenting, reversed the District Court in an opinion rendered January 14, 1958.[1] The Court of Appeals held that as the General Drainage Law if the State of Florida conferred on drainage districts the power to purchase property, a drainage district had the implied

1. The majority of the Court consisted of Judges Brown and Tuttle, Judge Rives dissening. The Court also observed that, if the authority to enter into the indemnity agreement existed that the respondent might well be estopped to deny its liability. (R. 36) Appendix B *infra* page B-10.

power to enter into an indemnity contract for the proper maintenance of the property acquired in consideration of the property being conveyed to the drainage district.[2]

On petition for rehearing, the Court of Appeals in a decision rendered May 15, 1958, in which one judge dissented,[3] withdrew and set aside its former opinion and affirmed the judgment of the District Court. In this rehearing opinion, the Court determined that the respondent drainage district was subject to the doctrine of sovereign immunity and, therefore, could not enter into an indemnity agreement.[4]

There is no authority in the State of Florida determining the issues in this case, and this non-existence of authority was recognized by the majority of the Court of Appeals in its first opinion (R 30).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is unconstitutional because of the Court's erroneous determination of its function in ascertaining state law in the exercise of diversity of citizenship jurisdiction. It was mandatory upon the Court of Appeals to answer the ques-

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2. Chapter 8558, Laws of Florida 1921, Section 1 and chapter 7897, Laws of Florida 1919, Section 26 are the statutes describing the relevant powers of drainage districts in Florida when the indemnity agreement in question was executed. Section 298.62, Florida Statutes 1957 and Section 298.22, Florida Statutes 1957, are the present counterparts of these earlier Statutes. They are printed as part of Appendix A herein, *infra* page A-1 et seq.

3. The majority of the Court consisted of Judges Tuttle and Rives. Judge Brown dissented.

4. In his dissent on rehearing Judge Brown emphasized that the majority had extended the doctrine of sovereign immunity to a new area in the face of a clear trend away from the use of this doctrine by the Florida courts. (R. 93-96) Appendix B *infra* page B-22.

tion of state law involved, even though it was as yet unanswered by any Florida court. *Meredith v. City of Winter Haven*, 320 U. S. 228 (1943).[5] In its decision the Court did not discuss its duty in diversity of citizenship cases of determining questions of applicable state law. Reasoning from two cases which held under the facts there involved that the drainage district could not be held liable for its tortious acts,[6] the Court determined that this disempowered the drainage district to enter into an indemnity agreement as a condition of a gift of an easement which the district had express power to re-

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5. In his dissent in the initial opinion of the Court of Appeals Judge Rives stated:

"I would affirm the judgment of the district court. If, however, its judgment is to be reversed, then, considering the nature of this action, its importance to the Drainage District, and to the execution of the policies of the State of Florida, I would not think that the form of the action as being at law instead of in equity ought to prevent the federal district court, as a matter of sound discretion, from declining to exercise its jurisdiction until the State courts can authoritatively settle the questions of State law."

Judge Rives cited:

Commonwealth of Pennsylvania v. Williams, 294 U. S. 176 (193g); *Burford v. Sun Oil Co.*, 319 U. S. 315 (1943); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U. S. 293 (1943); *Meredith v. City of Winter Haven*, 320 U. S. 228 (1943); *Alabama Public Service Commission v. Southern Ry. Co.* 341 U. S. 341 (1951); *Leiter Minerals, Inc. v. United States*, 352 U. S. 220 (1957).

It is here submitted that this course of action was unavailable to the Court of Appeals under the doctrine of the case of *Sutton v. Leib*, 342 U. S. 402 (1952). The Florida legislature has provided that federal courts can certify questions of Florida law to the Supreme Court of Florida if the Supreme Court of Florida implements this statute by rule of Court. Sections 25.031 and 25.032, Florida Statutes 1957. This statute has not been implemented by rule of Court. See Finnegan, J. concurring in *Standard Accident Ins. Co. v. New Amsterdam Casualty Co.*, 249 F.2d 847 at 853 (7th Cir. 1957).

6. *Arundel Corporation v. Griffin*, 89 Fla. 128, 103 So. 422 (1925) and *Rabin v. Lake Worth Drainage District*, ____ Fla. ____, 82 So.2d 353 (1955). These cases do not deal with the power of a drainage district to contract.

ceive. In so deciding, the Court of Appeals applied the doctrine of sovereign immunity in an instance not before applied by the Florida Courts in the face of a manifest trend away from the use of this doctrine in the Florida law. *Kaufman v. City of Tallahassee*, 84 Fla. 634, 94 So. 697 (1923); *State Road Department v. Tharp*, 146 Fla. 754, 1 So. 2d 868 (1941); *State Road Department v. Bender*, 147 Fla. 15, 2 So. 2d 298 (1941); *Doyle v. City of Coral Gables*, 159 Fla. 802, 33 So. 2d 41; (1948); *Bray v. City of Winter Garden* ... *Fla.* ..., 40 So. 2d 459 (1949); *Holdbrook v. City of Sarasota* ... *Fla.* ... 58 So. 2d 862 (1952); *Goff v. City of Ft. Lauderdale* ... *Fla.* ... 65 So. 2d 1 (1953); *City of Miami v. Brooks* ... *Fla.* ..., 70 So. 2d 306 (1954); *Hargrove v. Town of Cocoa Beach* ... Fla. ..., 96 So. 2d 130 (1957).

The judicial power of federal courts in diversity of citizenship cases as defined in Article III, Section 2 of the Constitution of the United States permits the federal court to determine questions of state law as an independent tribunal when there is no state law on the question in issue. The requirement of the Rules of Decision Act, 28 U. S. C., Section 1652, that the federal courts follow "the laws of the several states" does not limit the authority of the federal court when there is an absence of state law on the question in issue. The pronouncement of *Erie R.R. v. Tompkins*, 304 U. S. 64 (1938), merely requires that the federal courts in diversity cases follow the state decisional law. The Court of Appeals misconceived its function in this case by failing to exercise its uninhibited mandate to determine this case as an independent tribunal when there is no state "law." As diversity of citizenship jurisdiction was properly invoked, petitioner had the right to insist that it be

fully exercised.[7] A federal court can disregard existing authority in state law if it is apparent that recent trends make such law antedated. *Bernhardt v. Polygraphic Co.* 350 U.S. 198 (1956).[8] It is clear, therefore, that a federal court should refuse to derive new state law by a process of inference from general principles of the law of the state in the same field. In the absence of precise state law determining the question in issue the constitutional function of a federal court in a diversity of citizenship case is to consider all sources of judicial authority and make its independent determination of the question. It must consult the total law of the state and general authorities, and consider trends in the law as well as any decisions on the question as may exist. The court must act in this independent fashion when the state court has not answered the question involved in the case in order to carry out its constitutional function in the exercise of diversity of citizenship jurisdiction.

2. The various United States Courts of Appeals are in apparent confusion as to how they should go about the task of ascertaining state law, when there is no pronouncement of the question at issue by any state court or tribunal. Recent decisions of the Second, Seventh, and Tenth Circuits adopt the view that in the absence of articulate state law on the question at issue, the Court would look to the law of other jurisdictions in determining what they felt the highest Court of the State in question would do when faced with the determination. *Marchessault v. National Grange Liberty*

7. *Meyer v. Tupper*, 66 U.S. 522 (1861).

8. Other cases demonstrating this flexibility of judicial function indiversity of citizenship cases are *Riverbank Laboratories v. Hardwood Products Corporation*, 350 U.S. 1003 (1956); *Mason v. Emery Wheel Works*, 241 F.2d 906 (1st Cir. 1957) and *Daily v. Parker*, 152 F.2d 174 (7th Cir. 1945).

Company, 229 F. 2d 698 (Second Circuit 1956), *Herrick v. Sayler*, 245 F. 2d 171 (Seventh Circuit 1957), and *Western Spring Co. v. Andrew*, 229 F. 2d 413 (Tenth Circuit 1956).[9] The Court of Appeals in the instant case, however, did not assume that when the Supreme Court of Florida was faced with the issue herein, that that Court would follow the only clear pronouncement on the point found in general authorities. Instead the Court of Appeals developed its main argument by a process of inference from the Florida authorities in the law of drainage districts. It also cited some general authority. The Court of Appeals was concerned with assaying the policy of the Florida law in determining this question.[10] The instant case involved the power of a drainage district to enter into a specific contract in a given context. The question as to the existence of this power has been clearly answered by a case from another jurisdiction considering the precise question under an almost identical statute against the same jur-

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9. This is apparently the view which was adopted by the later Seventh Circuit Court of Appeals in the case of *Standard Accident Insurance Co. v. New Amsterdam Casualty Co., supra*, note 5.
The court of appeals apparently agrees with the approach taken in the third circuit case of *Fisher v. American National Insurance Company* 241 F.2d 175 (1957).

10. The Court in the instant case did not discuss the question of whether it was to go about construing the statute in question in the same *manner* the highes court of Florida would employ in placing a construction on the statute. Clearly the federal courts when sitting in diversity cases must decide questions of state law as if they were sitting as judges of the states' highest courts. *Cooper v. American Air Lines*, 149 F.2d 355 (2nd Cir. 1945). The Federal Court must, then, adopt the same approach to the problem as would be adopted by the state court. The Seventh Circuit of Appeals in the case of *Herrick v. Sayler*, 245 F.2d 171 (1957) carefully considered the approach which would be taken by an Indiana court if it were faced with the question of interpreting the Indiana statute which was before the Federal Court in a diversity case as a question of first impression.

isprudential background. *H. Hohensee Construction Co. v. Chicago M. St. P. & P. Ry. Co.*, 218 Wis. 390, 261 N. W. 242 (1935).[11]

It would seem manifest that the Supreme Court of Florida, if faced with the question herein, would have followed this decision and that litigants could rely upon a Florida court so determining the question. The determination by the Court of Appeals reflects judicial confusion that exists among the various circuits as to their function in determining state law in diversity of citizenship cases.

3. The Court of Appeals determined that the respondent Drainage District was without power to enter an indemnity contract because the Drainage District was not liable for its torts. This determination was not predicated on any direct Florida authority, and it is a determination which conflicts with the established trend of Florida law to limit the use of the doctrine of sovereign immunity. *Kaufman v. City of Tallahassee*, 84 Fla. 634, 94 So. 697 (1923); *State Road Department*

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11. In his dissent in the opinion of the Court of Appeals on rehearing, Judge Brown observed that:

"[A] breach of performance would be a breach of contract notwithstanding the fact that it might have tort implications, see, e.g., *Weyerhaeuser S.S. Co. v. Nacirema Co.*, ___ U.S. ___, 2 L.ed. 2d 491, see especially at p. 494 and footnote 5; *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 100 L.ed 133, 141."

Liability has been imposed on Florida municipal corporations on the theory of implied contract when the conduct complained of was the tortious carrying out of an implied contractual duty. *City of Miami v. Brooks*, ___ Fla. ___, 70 So.2d 306 (1954) citing cases; *Goff v. City of Ft. Lauderdale*, ___ Fla. ___, 65 So.2d 1 (1953). It cannot reasonably be argued that a drainage district is so unlike a municipal corporation that this authority should not have been of weight in the Court's determination of the law to be applied in the instant case. *Ronald v. Ryan*, 157 Fla. 470, 260 So.2d 339 (1946).

v. Tharp, 146 Fla. 754, 1 So. 2d 868 (1941); *State Road Department v. Bender*, 147 Fla. 15, 2 So. 2d 298 (1941); *Doyle v. City of Coral Gables*, 159 Fla. 802, 33 So. 2d 41 (1948); *Bray v. City of Winter Garden* Fla. , 40 So. 2d 459 (1949); *Holbrook v. City of Sarasota* Fla. , 58 So. 2d 862 (1952); *Goff v. City of Ft. Lauderdale* Fla. 65 So. 2d 1 (1953); *City of Miami v. Brooks* Fla. , 70 So. 2d 306 (1954); *Hargrove v. Town of Cocoa Beach* Fla. , 96 So. 2d 130 (1957).

The case of *H. Hohensee Construction Co. v. Chicago M. St. P. & P. Ry. Co.*, 218 Wis. 390, 261 N. W. 242 (1935),[12] is the only precise judicial pronouncement on the issue involved in this case. This case, determined under an almost identical statute, found that the power of a drainage district to receive land by purchase implied the power to execute an indemnity agreement. The determination of the Supreme Court of Florida would doubtless have adopted the interpretation of the drainage district law set forth in the *Hohensee* case, especially in light of the limitation being placed on the doctrine of sovereign immunity by that court.

12 . The holding of the *Hohensee* case is that an indemnity contract of the kind involved in the instant case is binding on the governmental entity even though the acts which create liability under the contract would fall within the realm of governmental function and would usually invoke the doctrine of sovereign immunity. The enumeration of powers of the City in the *Hohensee* case and the drainage district in the instant case are virtually identical and it is clear under the holding of the *Hohensee* case that the implied power to enter into an indemnity agreement follows as a natural concomitant of the power to receive a grant of property. The *Hohensee* case is supported by the later case of *Pohland v. City of Sheboygan*, 251 Wis. 20, N. W. 2d 736 (1947).

As was pointed out by Judge Brown in his dissent in the rehearing opinion, the effect of the majority's opinion was to obliterate the distinction between tort and contract. (R. 94).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

28 U.S.C. § 1652 STATE LAWS AS RULES OF DECISION.

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

Ch. 8558, Laws of Florida 1921, Section 1:

"Section 1. That any and all drainage and sub-drainage districts created or organized under the Laws of the State of Florida are hereby authorized and empowered to acquire by gift, purchase, exchange, donation or condemnation any lands within or without the said district for canal rights-of-way, or for other general purposes of the said District, and if acquired by condemnation shall be, upon filing a petition in the office of the Clerk of the Circuit Court of the county wherein the lands lie, which petition shall set forth the following;"

§ 298.62, Florida Statutes 1957:

"Lands may be acquired for right-of-ways and other purposes.—Any and all drainage and sub-drainage districts created or organized under the laws of the state may acquire by gift, purchase, exchange, donation or condemnation, any lands within or without the said district for canal rights-of-ways, or for other general purposes of the said district, and if acquired by condemnation the procedure shall be as prescribed in Chapter 73."

Ch. 7897, Laws of Florida 1919, Section 26:

"In order to effect the drainage, protection and reclamation of the land in the district subject to tax the Board of Supervisors is authorized and empowered . . . to construct any and all of said works and improvements across, through or over any public highway, railroad right of way, track, grade, fill or cut in or out of said district; to remove any fence, building or other improvements in or out of said district, and shall have the right to hold, control and acquire by donation or purchase and if need be, condemn any land, easement, railroad right of way, sluice, reservoir, holding basis or franchise in or out of said district for right of way, holding basin for any of the purposes herein provided, or for material to be used in constructing and maintaining said works and improvements for drainage, protecting and reclaiming the land in said district. . ."

§ 298.22, Florida Statutes 1957:

"In order to effect the drainage, protection and reclamation of the land in the district subject to tax, the board of supervisors may clean out, straighten, open up, widen, or change the course and flow, alter or deepen any canal, ditch, drain, river, water-course, or natural stream; and concentrate, divert or divide the flow of water in or out of said district; construct and maintain main and lateral ditches, canals, levees, dikes, dams, sluices, revetments, reservoirs, holding basins, floodways, pumping stations and syphons, and may connect same, or any of them, with any canals, drains, ditches, levees or other works that may have been heretofore, or which may be hereafter constructed by the trustees of the internal improvement fund or the board of

drainage commissioners of the state, and with any natural stream, lake or water-course in or adjacent to said district, build and construct any other works and improvements deemed necessary to preserve and maintain the works in or out of said district; acquire, construct, operate, maintain, use sell, convey, transfer or other wise provide for pumping stations, including pumping machinery, motive equipment, electric lines and all appurtenant or auxiliary machines, devices or equipment; contract for the purchase, construction, operation, maintenance, use, sale, conveyance and transfer of the said pumping stations, machinery, motive equipment, electric lines and appurtenant equipment, including the purchase of electric power and energy for the operation of the same; construct or enlarge, or cause to be constructed or enlarged, any and all bridges that may be needed in or out of said district, across any drain, ditch, canal, floodway, holding, basin, excavation, public highway, railroad right of way, track, grade, fill or cut; construct roadways over levees and embankments; construct any and all of said works and improvements across, through or over any public highway, railroad right of way, track, grade, fill or cut, in or out of said district; remove any fence, building or other improvements, in or out of said district; and shall have the right to hold, control and acquire by donation or purchase and if need be, condemn any land, easement, railroad right of way, sluice, reservoir, holding basin or franchise, in or out of said district, for right of way, holding basin for any of the purposes herein provided, or for material to be used in constructing and maintaining said works and improvements for drainage, protecting and reclaiming the lands in said district. Said board of supervisors also may develop, hold and control all water power created by the

construction of works of said district, and may construct and maintain hydro-electric power plants for the purpose of developing such power for the use of said district, use any funds in the treasury of said district not otherwise appropriated for the construction and maintenance of such power plants; and the said board of supervisors may lease any surplus power in excess of that required for the uses of said district, and the proceeds of such leases shall be paid into the treasury of said district. Said board also may condemn or acquire, by purchase or grant, for the use of the district, any land or property within or without said district not acquired or condemned by the court on the report of the commissioners assessing benefits and damages, and shall follow the procedure set out in chapter 73.

APPENDIX B

ORDER.
Filed Jan. 19, 1957.

In the District Court of the United States in and for the Southern District of Florida, Tampa Division.

Seaboard Air Line Railroad Company, a corporation existing under the laws of the State of Virginia, Plaintiff,

v. No. 2949 Civil T.

Sarasota-Fruitville Drainage District, a corporation existing under the laws of the State of Florida, Defendant.

This cause came on to be heard upon Motion of the Defendant to Dismiss the Complaint, and the Court having heard argument of counsel and being fully advised in the premises, and it appearing that the Defendant is a Drainage District created, organized and existing under and by virtue of the General Drainage Laws of the State of Florida, and the Court being of the opinion that it had no authority to bind itself as an indemnitor as consideration for the acquisition of an easement in land, and that it cannot be held liable in tort, it is upon consideration,

Ordered and Adjudged that the said Motion to Dismiss be, and the same is hereby granted, and the Complaint is hereby dismissed.

Done and Ordered in Tampa, Florida, this the 19th day of January 1957.

WILLIAM J. BARKER,
Chief Judge, U. S. District Court.

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 16590

SEABOARD AIR LINE RAILROAD COMPANY,
Appellant,

versus

SARASOTA-FRUITVILLE DRAINAGE DISTRICT,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(January 14, 1958.)

Before RIVES, TUTTLE and BROWN, Circuit Judges.

BROWN, Circuit Judge: The sole question presented here is whether a Florida Drainage District admittedly not liable for torts as such under Florida law, *Rabin v. Lake Worth Drainage Dist.*, . . . Fla. . . . , 82 So. 2d 353, cert. den. 350 U.S. 958, 100 L.ed. 833; *Arundel Corp. v. Griffin,* 89 Fla. 128, 103 So. 422, is liable to a Railway on an indemnity-hold-harmless agreement in a canal right of way easement granted by the Railway 28 years before. The District Court held that it was not and accordingly dismissed the complaint for failure to state a claim, FRCP 12.

The specific claim was to recover approximately $28,000 in losses sustained by the Railway as a result of one of its trains being derailed December 5, 1953.

with consequent damage to its equipment and personal injury to persons. It was alleged that the derailment was caused by the lowering by the District of its ditches adjacent to the District's undertrack culverts, so that the roadbed gave way and the underlying support to the tracks was lessened.

In 1925 the Railway, for a nominal stated cash consideration ($5.00) but " * * in further consideration of the faithful performance by the [District] of [its] covenants * * *," granted the right to lay, maintain, operate and use two specified culvert crossings under its tracks and right of way. The District was expressly required to pay all costs in the initial installation as well as in the maintenance, use, repair and removal of the facilities.[1] And, of crucial importance here, the District expressly agreed:

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1. "3. The lines of pipe shall be installed, maintained, repaired and renewed at the expense of the Licensee [District] and under the supervision and direction, and subject to the approval and acceptance, of the Chief Engineer of the Railway.

* * * * *

"5. The Licensee [District] will make all repairs to the tracks and other property of the Railway necessitated by the installation, operation, use, maintenance or removal of said lines of pipe * * * The Railway may, at its option, make such repairs, and the Licensee [District] will * * * promptly reimburse the Railway therefor.

"6. Should the Licensee [District] discontinue the operation of said lines of pipe * * * said lines of pipe shall be removed by the Licensee [District] at the expense of the latter, from beneath the tracks and from the property of the Railway, or the Railway may, at its option, remove the same, at the expense of the Licensee [District]. In case of such removal, * * * the tracks and property of the Railway are to be left in as good condition as when previously found * * *.

"7. The Railway may terminate this agreement at any time by giving the Licensee [District] thirty days notice * * * and upon termination * * * the Licensee [District] * * * will, at his own expense, remove said lines of pipe * * * from beneath the tracks and from the property of the Railway, or the Railway, * * * may remove the same, at the expense of the Licensee [District]."

> "8. The Licensee [District] hereby assumes all risk of loss, injury or damage of or to the person and the property of the Licensee [District] and all other persons and property, growing in any manner out of the installation, presence, operation, maintenance or removal of said lines of pipe, or any of the appurtenances or appliances, or any part thereof. And the Licensee [District] will further, at all times, indemnify and save harmless the Railway from all loss, damage, cost and expense which the Railway may sustain, resulting from loss, injury or damage caused as aforesaid."

What the scope of the indemnity may be, whether, on proof it covers this occurrence, whether if, as suggested, it arose from the Railway's negligence not within the reach of this terminology, are questions not before us. All the Court below decided, all that confronts us, is the assertion that this indemnity undertaking was beyond the power of a Florida drainage district so that the District could not be liable either on the contract or by estoppel.

We recognize that making our way as best we can in our *Erie* lights, there is especial reason that we faithfully search out and apply the Florida law. Here we deal not only with Florida law as jurisprudence, but our decision necessarily affects Florida in its political adjustments between members of the public and public creatures of the sovereign. Not the least of the difficulties in the process is that if we err, or if experience proves our decision unsound, unlike the Courts of Florida, we do not have the means or opportunity for correction. Our function is not aided, our travail not lessened, by handy labels of "strict" or "conserva-

tive" approach or the like. If, in this problem concerning which Florida has not yet written, it is the Florida policy to recognize the validity of such contracts where property interests are acquired by them, it would not be "strict" construction or "conservative" to hold to the contrary out of some supposed notion that, when in doubt, the judicial function is to lean backwards, not forward.

Consequently, what is the starting point remains just that and is not, as in the District urges, the final solution as well. There seems to be little disagreement that Florida treats drainage districts as a special governmental body created for a limited and definite purpose with limited authority and a limited power to tax.[2]

The approach, as it is for related drainage districts, is that "The creative statute is a grant of power and the supervisors of the district must look entirely to the statute for their authority." State ex rel. *Devis v. Jumper Creek Drainage District,* 153 Fla. 451, 14 So. 2d 900. As these statutes set out the various powers in much detail, "The careful enumeration of these powers is an indication that this Board was not to have any others than those enumerated. * * *" *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District,* 77 Fla. 742, 82 So. 346.

From this emphasis on the necessity for *express* powers, the District urges that, in contrast to the Florida rule for counties investing them also with " * * *

[2] See, Halifax Drainage Dist. of Volusia County v. State, 134 Fla. 471, 185 So. 123; State ex rel. Root v. Crandon, 115 Fla. 153, 155 So. 6.67; Hardee v. State, 83 Fla. 544, 91 So. 909; Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District, 77 Fla. 742, 82 So. 346; Arundel Corp. v. Griffin, 89 Fla. 128, 103 So 422; 11 Fla. Jur., Drainage and Drainage Districts, § 9.

implied authority to use means necessary to make the expressed power effective * * *," *Molwin Investment Co. v. Turner*, 123 Fla. 505, 167 So. 33, a district does not have the power to do those things reasonably necessary to carry out the express power.

We think that giving full voice to this approach, the inquiry remains one of statutory authorization, and as to that, we conclude that this type of contract is authorized.

Under one statutory provision, a district "* * * shall have the right to hold, control and acquire by donation or purchase and if need be, condemn any land, easement, railroad right of way[3] * * *," and under another it "* * * may acquire by gift, purchase, exchange, donation or condemnation, * * * lands * * * for canal right of ways[4] * * *."

The acquisition of right of way for ditches, culverts, and canals is an absolute essential to the operation of a drainage district. A district has the express power to acquire and hold property. Whether this easement contract is an "exchange" of a right in land from

3. Florida Statute, Sec. 298.22, the district may "* * * construct and maintain * * * ditches, canals * * *; construct any and all of said works and improvements across, through or over any public highway, railroad right of way, track, grade, fill or cut * * *; and shall have the right to hold, control and acquire by donation or purchase and if need be, condemn any land, easement, railroad right of way, * * * for right of way * * *."

4. Fla. Stat., §298.62:
"Any and all drainage and sub-drainage districts created or organized under the laws of the state may acquire by gift, purchase, exchange, donation or condemnation, any lands within or without the said district for canal right of ways, or for other general purposes of the said district, and if acquired by condemnation the procedure shall be as prescribed in chapter 73."

the Railway in return from the promises of the District in paragraph 8, and those detailed in note 3, *supra,* we need not narrowly determine. Neither do we resolve it narrowly as a "purchase." The two terms, used in parallel, reflect a purpose to allow some latitude in the choice of means by which the property right is obtained.

The express right to resort to condemnation is a positive assurance that needed property will be acquired. It reinforces the inference that it was to be left to the good faith managerial judgment of the district authorities to determine the relative advantages or disadvantages in the various available means of acquiring the needed facilities. The consideration for the property might be the payment of a lump sum in cash along conventional lines or the payment of stated sums over a fixed period of time. The right and obligation to pay flows from the power to acquire.

But its nature is not altered if the consideration is not cash, but an agreement to do a specific thing. For example, the undertaking in paragraph 5, note 3, *supra,* to make and pay for repairs to the Railway's property occasioned by maintenance work, removal or replacement of the culverts is certainly reasonable. Could one seriously question the obligation of the district to do these things even had its easement or title been acquired by condemnation? A parallel of this, and just as reasonable, is the undertaking in paragraph 8 imposing on the district responsibility for "* * * loss, injury or damage of or to the person and the property of the Licensee [District] * * *." Each of these is an essential ingredient to the act of the Railway in granting the right. While the subsequent undertaking in para-

graph 8 to indemnify is an additional obligation, the basic nature of it as a consideration moving the Railway to make the grant remains the same.

The legislature has invested the district with authority to acquire by purchase or exchange. It has not prescribed how or in what manner that purchase must be effected, nor the nature or duration of the title. The statutes do not demand that the consideration for the purchase must be cash, now or later. To use a promise as the consideration is a part of the express power (and its exercise) to acquire by purchase-exchange.

Independent of concepts of estoppel which we need not pass on, this approach seems to be a sensible, reasonable businesslike recognition that where one obtains the right to, or use of, property by agreements which are traditional in nature, any such agreement is not a collateral undertaking, but is, in reality, a part of such acquisition. If the property, or the right to its use, comes from the agreement, the agreement, reasonably related to the purpose of the acquisition, is as valid as the ownership. The one does not exist without the other. This concept has been well expressed in *H. Hohensee Construction Co. v. Chicago, M. St.P. & P. Ry Co.*, . . . Wis. . , 261 N.W. 242, 243:

> "This enumeration of powers implies the power to enter into an agreement of indemnity whenever such an agreement is necessary to its protection or is to its advantage in connection with any contract it has express power to make.
>
> * * * If it may accept a gift of land for sewer purposes, it may accept it subject to such conditions as accompany the gift. If it may accept

> a gift of land for such purpose, it may accept a gift of an easement in land for such purpose. If it may purchase land for such purpose, it may purchase an easement in land for such purpose. If it may purchase an easement for such purpose, it may purchase it without other consideration therefor than a promise to indemnify the donor against liability resulting from the use covered by the easement, and against liability to which it is subjected during the making of the structure."

We recognize that it is probable in some states, and perhaps possible as to some others, that the respective courts would consider an indemnity agreement beyond the power of the subordinate governmental entity.[5] Some of them, e.g., *Vaughtman v. Town of Waterloo,* note 5, *supra,* and *Wheeler v. Sault Ste. Marie,* note 5, *supra,* emphasize particularly the usual incapacity to make a surety or guaranty contract. But the contract here is not really comparable to a traditional surety bond or undertaking to answer for the obligations of another. Whatever the ultimate uncertainty might be as to the significance, if any, of the presence or lack of negligence on the part of the District or Railway or both, the contract makes positive that it relates in an operational realistic sense to the activities of the District. By its terms the losses covered are confined to

[5] See, e.g., these cases pressed heavily by the District: Nashville v. Sutherland, 92 Tenn. 335, 21 S.W. 674; Becker v. Koekuk Water Works, 79 Iowa 419; People v. Dibble, 189 N.Y.S. 29; Vaughtman v. Town of Waterloo, 14 Ind.App. 649, 43 N.E. 476; Davenport v. Pitt Cty Drainage District No. 2, 220 N.C. 237, 17 S.E.2d 1; Wheeler v. Sault Ste. Marie, 116 Mich. 338, 129 N.W. 685; American Malleables v. Town of Bloomfield, N.J., 81 Atl. 500, affd. 85 Atl. 167.

those "* * * growing in any manner out of the installation, presence, operation, maintenance or removal of said * * *" facilities.

Nor is there any basis for the fear that this subjects a drainage district to a perpetual uncertain liability for unpredictable amounts. The District may subject the matter to a continuous review to determine the current wisdom of retaining essential property acquired by the making of these promises, rather than through the expenditure of cash resources by voluntary purchase or by condemnation. Upon such review, the district is free to determine a contract of this kind for a voluntary grant of an easement subject to a thirty-day cancellation and obtain an absolute right or title free of conditions by condemnation proceedings.

While estoppel need not, if it could, be invoked to sustain an action beyond a district's power, see *Hoskins v. City of Orlando,* 5 Cir., 51 F.2d 901, it may well be where, as has now been done by us, the question of power has been resolved and all that remains is the manner of its exercise. This would include the assertion of the subsidiary contention that the contract whose benefits have been enjoyed for 28 years had not been executed by the proper officers or with adequate formalities. For Florida recognizes a basic distinction that "* * * the principle of estoppel does not operate to confer authority, though it may under some circumstances be invoked to preclude a denial that authority conferred was duly exercised." *State v. Greer,* 88 Fla. 249, 102 So. 739.

It follows that a claim was stated, and the cause must be reversed and remanded for further and not inconsistent proceedings.

REVERSED AND REMANDED.

RIVES: Circuit Judge, Dissenting:

I agree with the learned district judge that the Florida Drainage District "had no authority to bind itself as an indemnitor as consideration for the acquisition of an easement." Further, it seems to me that what the Drainage District actually acquired from the Railroad does not rise to the dignity of an easement, but is nothing more than a mere license. That is shown by the contract as a whole and particularly by paragraph 7 thereof:

> "7. The Railway may terminate this agreement at any time by giving the Licensee thirty days notice, in writing, of its intention so to do, and upon termination of this agreement the Licensee, if required by the Railroad so to do, will, at his own expense, remove said lines of pipe and all appliances or appurtenances thereunto belonging, from beneath the tracks and from the property of the Railway, or the Railway, at its option, or upon the refusal of the Licensee so to do, may remove the same, at the expense of the Licensee."

Florida gives full recognition to the difference between an easement and a license, an easement being an interest in land permanent in nature, while a license is a mere privilege to do some act or acts upon the lands of another.[1]

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1. See Seaboard Air Line Ry. Co. v. Dorsey, Fla. 1932, 149 So. 759, 761; Burdine v. Sewell, Fla. 1926, 109 So 648, 652; J. C. Vereen & Sons v. Houser, Fla. 1936, 167 So. 45, 47; 17 Am.Jur., Easements, §4; 28 C.J.S., Easements, §2 b.

Florida Statute, §298.22, quoted in pertinent part in footnote 3 to the majority opinion, gives the Drainage District authority to acquire "* * * any land, easement, railway right of way * * * for right of way * * *." Section 298.62, quoted in footnote 4 of the majority opinion, gives the District authority to acquire " * * * any lands within or without the said district * * *." Nowhere can there be found authority to enter into an executory contract for the acquistion of a mere revocable license.

A drainage district in Florida is a governmental body with a limited sphere of operation and limited powers, and with no power or authority other than that conferred by statute.[2]

The authority to enter into a contract of indemnity, here sought to be enforced, cannot be derived from the authority to "purchase" or "exchange" "lands" or an "easement." The word "purchase" in common usage means to obtain property by paying an equivalent in money.[3] "Exchange" is a word of precise import meaning the giving of one thing for another and requiring the transfers to be in kind.[4] The Florida statutes do not expressly or impliedly authorize the Drainage District to bind itself by future promises contained in an executory contract any more than they authorize the District to bargain for or acquire a mere license or personal privilege for a right of way.

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2. Forbes Pioneer Boat Line v. Board of Com'rs, Fla. 1919, 82 So. 346, 350; Halifax Drainage District Volusia County v. State, Fla. 1938, 185 So. 123, 129; State ex rel Davis v. Jumper Creek Drainage District, Fla. 1943, 14 So. 2d. 900, 901.

3. 35 Words and Phrases, permanent ed., page 477.

4. 15A Words and Phrases, permanent ed., pp. 131, et seq.

The Wisconsin case of *H. Hohensee Construction Company v. Chicago M.St.P. & P. Ry. Co.*, . . Wis. . . , 261 N.W. 242, 243, is distinguishable because the City of Milwaukee had much broader powers than the Florida Drainage District. A later Wisconsin case, *Pohland v. City of Sheboygan*, 251 Wis. 20, 27 N.W. 2d 736, pointed out that that case should not be construed to hold that the city can make an indemnity contract "except so far as it is necessary for its own protection." It was not necessary here for the Drainage District to make a contract of indemnity for, if it could not agree with the Railroad on the purchase of a right of way, the Florida statutes vested in the Drainage District the power of condemnation.

No principle of estoppel can apply against the Drainage District, because it is a creature of the general statutes and all persons dealing with it are charged with notice of the limitation of its powers.[5]

It has been clearly established that a drainage district is not liable for its torts. *Rabin v. Lake Worth Drainage District, Fla.* 1955, 82 So. 2d 353. One of the grounds for that immunity was thus expressed by the Supreme Court of Florida:

> "The district has the power only to assess against lands within its boundaries assessments to accomplish an over-all drainage operation to make the lands within the whole area cultivable and keep them so. The assessments for main and subsidiary canals are made against the individual parcels of lands accord-

5 State ex rel Davis v. Jumper Creek Drainage District, Fla. 1943, 14 So. 2d. 900, 901. See, also, Mayor, etc. of City of Nashville v. Sutherland, 92 Tenn. 335, 21 S.W. 674.

> ing to the benefit each parcel will receive from the project as a whole. Hearings are conducted so that any property owner aggrieved by the assessment may be heard. The financing of the improvement is based on the total assessment, the obligation undertaken to construct the project is discharged from the assessments paid. How could the district be coerced to pay any judgment obtained in a tort action except on the theory that by the commission of the tort the lands in the district were benefited?" 82 So. 2d at p. 355.

The immunity of the drainage district from liability for torts is for the benefit of the landowners of the district and to insure that their tax moneys will be applied to the purposes for which the drainage district was established.

The same public policy of the State of Florida which immunizes the Drainage District from liability for its torts should apply with all the more force to forbid it to enter into an indemnity agreement covering but not limited to losses resulting from the negligence or fault of the Drainage District.

When the Florida Legislature and its courts have thus declared the public policy of the State, that policy should not be nullified by the contract of the supervisors of the district.

I would affirm the judgment of the district court. If, however, its judgment is to be reversed, then, considering the nature of this action, its importance to the Drainage District, and to the execution of the policies of the State of Florida, I would not think that the

form of the action as being at law instead of in equity ought to prevent the federal district court, as a matter of sound discretion, from declining to exercise its jurisdiction until the State courts can authoritatively settle the questions of State law.[6]

I respectfully dissent.

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[6] Commonwealth of Pennsylvania v. Williams, 294 U.S. 176, 185, 55 S.Ct. 380, 385, 79 L.Ed. 841; Burford v. Sun Oil Co., 319 U.S. 315, 318, 63 S.Ct. 1098, 87 L.Ed. 1424; Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 297, 63 S.Ct. 1070, 87 L.Ed. 1407; Meredith v. City of Winter Haven, 320 U.S. 228, 235, 64 S.Ct. 7, 88 L.Ed. 9; Alabama Public Service Commission v. Southern Ry. Co., 341 U.S. 341, 349, 350, 71 S.Ct. 762, 95 L.Ed. 1002; Leiter Minerals, Inc. v. United States, 1957, 352 U.S. 220, 229.

JUDGMENT.

Extract from the Minutes of January 14, 1958.

SEABOARD AIR LINE RAILROAD COMPANY, No. 16590 versus

SARASOTA-FRUITVILLE DRAINAGE DISTRICT.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further and not inconsistent proceedings in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellee, Sarasota-Fruitville Drainage District, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, dissenting."

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 16590

SEABOARD AIR LINE RAILROAD COMPANY,
Appellant,

versus

SARASOTA-FRUITVILLE DRAINAGE DISTRICT,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(May 15, 1958.)

ON PETITION FOR REHEARING

Before RIVES, TUTTLE and BROWN, Circuit Judges.

TUTTLE, Circuit Judge: This is a motion for rehearing of the decision of this Court which held, one judge dissenting, that the judgment of the trial court should be reversed, 5 Cir., 251 F. 2d 583. The question presented on the appeal is the validity of an agreement entered into in 1925 by which the Drainage District agreed to save the Railroad harmless "from all loss, damage, cost and expense which the Railway may sustain, resulting from loss, injury or damage . . . growing in any manner out of the installation, presence, operation, maintenance or removal of" culverts which the railroad gave the district a license, cancellable by the railroad upon 30 days' notice, to install beneath its trackage on its right of way.

On this motion the Drainage District strongly urges that such a state taxing unit cannot by contract bind itself to an obligation to respond for its acts injuring the appellant if it is not liable for such acts in absence of contract.

In considering a case such as this it must be borne in mind that the defense of the Drainage District carries with it none of the moral stigma which attaches to the repudiation by persons sui juris of their contractural obligations. If the district is by law incapable of binding itself in this manner it is because of an overriding public policy, and moreover it is or should be as apparent to the other party to the contract as to the court which announces the principle. It is, after all, one of the oldest concepts in our system of government that the covereign cannot be sued without its consent. This principle was succinctly stated by the United States Supreme Court in *Kawananakoa v. Polyblank*, 205 U.S. 349:

> "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal rights as against the authority that makes the law on which the right depends." 205 U.S. 349, 353.

Upon careful consideration we think our previous decision too greatly emphasized the power of the district to contract for the right to traverse the railroad's right of way and ignored the critical fact that the contract here made to acquire that right embodied an agreement that may have been against public policy.

As we said in our original opinion, all are agreed that the Florida law is explicit that a drainage district created by Florida statute may not be made answerable for its torts. *Arundel Corp. v. Griffin*, 89 Fla. 128; *Rabin v. Lake Worth Drainage Dist.*, Fla., 82 So. 2d 353, cert. denied 350 U.S. 958. Even though in the latter case the effort to hold the district was on the theory of an illegal taking of the plaintiff's property the Supreme Court of Florida recognized that the damage arose in tort and said:

> "The General Drainage District Act, Chapter 298, Florida Statutes, F.S.A., authorizes the levying of taxes for specific purposes stipulated in the Act. These are limited strictly to the improvement and maintenance of the drainage district and the taxing power of the Board of Supervisors cannot be exercised for any other purpose—general or special. See Campbell v. State, 133 Fla. 638, 183 So 340. To this extent it can safely be concluded that it was not contemplated by the Legislature that a drainage district organized under the Act could be compelled to respond in damages for a tort or forced to levy taxes for this purpose."
>
> *Rabin v. Lake Worth Drainage District*, 82 So. 2d 353.

The State of Florida has a valid interest in protecting its taxpayers and citizens through public bodies such as this drainage district from certain liabilities. In determining for what purposes the taxes paid shall be put, the state has undertaken through statute and court decisions to balance the interests of individuals dealing with the districts on the one hand and the tax-

payers acting through the public bodies on the other. The statutes, in light of the decided cases, give the district the power only to levy taxes for specific purposes and those purposes are limited to the improvement and maintenance of the drainage district. The District does have the power to acquire land or the use of it by purchase, but the issue is whether it can agree to pay for such purchase by a means which is contrary to the policy of the state.

Certainly the district could pay money or other valuable consideration, so long as the consideration is not one that is itself illegal. Since the district could not be liable by law in tort for its negligence or vicariously for that of others, it should not be allowed to accept such liability merely because accepting it is consideration for the acquisition of a valuable right. To hold otherwise would be to permit the district to negate a policy the state has established for the protection of its citizens by permitting the district to assume a liability or purpose for which the taxpayer's money is to go when the legislature and the courts of Florida have said that such money must not go for that purpose.

The Florida Supreme Court has held in several cases that the fact that a taxing unit has attempted to obligate itself to use tax money in a way not otherwise authorized v making a contract that is beneficial to the taxing unit does not justify the otherwise illegal expenditure of tax funds. *State, ex rel, Davis v. Jumper Creek Drainage District,* 153 Fla. 451, 14 So. 2d 900; *First National Bank of Jacksonville v. Duval County,* 45 Fla. 496; 34 So. 894; *Brumby v. City of Clearwater,* 108 Fla. 633, 149 So. 203.

We conclude that the indemnity agreement in the contract was void and may not be enforced.

The conclusion we now reach is, we think, also in accord with the weight of authority in other jurisdictions. *Nashville v. Sutherland,* 92 Tenn. 335, 21 S.W. 674; *Becker v. Keokuk Water Works,* 79 Iowa 419; *Vaughtman v. Town of Waterloo,* 14 Ind. App. 649, 43 NE 476; *Wheeler v. Sault Ste. Marie,* 116 Mich. 338, 129 NW 685; *Adams v. City of New Haven,* 131 Conn. 552, 41 A. 2d 111; *Nashville Trust Co. v. City of Nashville,* 182 Tenn. 545, 188 S.W. 2d 342.

The motion for rehearing is granted; the decision and opinion of this Court heretofore entered are withdrawn and set aside and the judgment of the trial court is AFFIRMED.

BROWN, Circuit Judge, Dissenting:

To the reasons set forth in the Court's original opinion, 251 F.2d 583, I would add as the basis of my dissent a few comments.

The Court's decision is changed not for the reasons set forth by my Brother Rives in his original dissent, 251 F.2d 583 at 588—it is changed because of the rule of sovereign immunity.

The rule of sovereign immunity is one which had its origin in a different day. It is, I believe, now thoroughly outmoded and despite the efforts of the logicians to make it appear just or wise, it is looked upon as an anachronism typical of the feudal monarchial society which gave it birth.

While in diversity litigation we are duty bound faithfully to search out and then apply state law, including a local rule of sovereign immunity, we ought not to apply it to *new* situations unless the tide of local analogous law is simply too much to stem. When faced with this problem, it is no simple answer to say that if the principle is unsound, it is for the legislature to make the change. As distasteful as it may be to conceptual puvists to acknowledge a legislative consequence in adjudication, the fact remains that decision-making is actually legislating, at least in the sense of applying or extending an old principle to a new situation.

That is precisely what is really done here. For all concede that the problem here presented is *new* to Florida, and whichever way we turn, we use the Florida past as the usual working tools for the future. But while this apparent conservatism may seem to make it more palatable, the fact is that we *now* decide for the *first* time that in this *new* situation the rule of sovereign immunity has pervasive decisive force.

Where the choice is open, I think we ought not to give this transfusion to a body of law that is now so weary. If we attempt to assess what the *likely* holding of Florida would be, we ought, I think, to appraise carefully the Florida climate in this very field. Here I think the Florida atmosphere is increasingly hostile to this vestigial rule for as *new* situations arise, Florida declines to apply it. See for example *State Road Department v. Bender,* 147 Fla. 15, 2 So. 2d 298; *State Road Department v. Tharp,* 146 Fla. 754, 1 So.2d 868; *Kaufman v. City of Tallahassee,* 84 Fla. 634, 94 So. 697; *Bray v. City of Winter Garden,* . . . Fla . . ., 40 So. 2d 459; *City of Miami v. Brooks,* . . . Fla. . . ., 70 So. 2d 306.

Moreover the approach[1] of the Court is to obliterate the distinction between a *tort* liability and that imposed by *contract* apparently on the theory that the dollar impact on the entity would be the same.

Of course that is to disregard really ancient markers as hoary as the plea that the king can do no wrong. And it introduces a disturbing innovation in Florida law that if, on analysis, the entity would not have been liable had the judgment been rendered in a tort action, there can be no liability under an express contract.

What that does is sharply illustrated by the contract in question here by which for twenty-five years the entire District has obtained a real and essential benefit. In it the District agreed that it would make all repairs to the track and right of way necessitated by the use, maintenance or alteration of the under-track

1. The Court states:
"Certainly the district could pay money or other valuable consideration, so long as the consideration is not one that is itself illegal. Since the district could not be liable by law in tort for its negligence or vicariously for that of others, it should not be allowed to accept such liability merely because accepting it is consideration for the acquisition of a valuable right. To hold otherwise would be to permit the district to negate a policy the state has established for the protection of its citizens by permitting the district to assume a liability or purpose for which the taxpayer's money is to go when the legislature and the courts of Florida have said that such money must not go for that purpose."

drainage lines.[2] That is a perfectly reasonable contractual undertaking. The right to make alteration and repairs and to maintain the drainage pipes gives rise to a *contractual* obligation to perform the operations in a workmanlike manner. A breach of performance would be a breach of *contract* notwithstanding the fact that it might have tort implications, see, e.g., *Weyerhaeuser S.S. Co. v. Nacirema Co.*, . . . U.S. . . . , 2 L.ed. 2d 391, see especially at p. 494 and footnote 5; *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 100 L.ed. 133, 141.

I would doubt that the most ardent advocate of sovereign immunity would claim that such a contractual undertaking was beyond the power of a Florida Drainage District if, assuming that the drainage easement was obtained by formal condemnation proceedings, the District, as a part of subsequent improvement or maintenance, went in and removed the dirt fill from under the tracks for a distance of 25 feet leaving rails and

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2. The contract provides:

"3. The lines of pipe shall be installed, maintained, repaired and renewed at the expense of the Licensee [District] and under the supervision and direction, and subject to the approval and acceptance, of the Chief Engineer of the Railway.

* * * * *

"5. The Licensee [District] will make all repairs to the tracks and other property of the Railway necessitated by the installation, operation, use, maintenance or removal of said lines of pipe * * * The Railway may, at its option, make such repairs, and the Licensee [District] will * * * promptly reimburse the Railway therefor.

"6. Should the Licensee [District] discontinue the operation of said lines of pipe * * * said lines of pipe shall be removed by the Licensee [District] at the expense of the latter, from beneath the tracks and from the property of the Railway, or the Railway may, at its option, remove the same, at the expense of the Licensee [District]. In case of such removal, * * * the tracks and property of the Railway are to be left in as good condition as when previously found * * *."

fastened ties suspended in mid-air Would the Railroad under the state and national duty imposed upon it to run the trains be without a remedy save by the sovereign's grace?

The answer, in the light of the Court's opinion, is now at best obscure. For now the touchstone is whether the liability is a *vicarious* tort liability or is akin to it or might have been cast in such a form.

By confusing that which is basically different, by sweeping aside a jurisprudence produced by centuries of experience recognizing, especially in the field of municipal and governmental entities, a distinction between tort and contract, we have done an unusual thing: we have made the wall of sovereign immunity higher and stronger in Florida.

I therefore respectfully dissent.

ORDER ON MOTION FOR REHEARING.

Extract from the Minutes of May 15, 1958.

SEABOARD AIR LINE RAILROAD COMPANY,

No. 16590

versus

SARASOTA-FRUITVILLE DRAINAGE DISTRICT.

It is ordered by the Court that the motion for rehearing filed by appellee in this cause on February 12, 1958 be, and the same is hereby, granted;

It is further ordered that the opinion and judgment heretofore entered on January 14, 1958, whereby the judgment of the United States District Court for the Southern District of Florida was reversed, be and the same is hereby, withdrawn and set aside;

On further consideration of this cause, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Seaboard Air Line Railroad Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Brown, Circuit Judge, dissenting."

FILE COPY

SEP 8 19
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 268.

SEABOARD AIR LINE RAILROAD COMPANY,
Petitioner,

vs.

SARASOTA-FRUITVILLE DRAINAGE DISTRICT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 268.

SEABOARD AIR LINE RAILROAD COMPANY,
Petitioner,

vs.

SARASOTA-FRUITVILLE DRAINAGE DISTRICT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The order of the District Court is quoted in the appendix to the petition (Pet. App. B-1). The initial opinion of the Court of Appeals (Pet. App. B-2) is reported in 251 F.2d 583. The opinion of the Court of Appeals on rehearing (Pet. App. B-17) is reported in 255 F.2d 622.

JURISDICTION.

The initial judgment of the Court of Appeals was entered on January 14, 1958 (Pet. App. B-16). The judgment of the Court of Appeals on rehearing was entered on May 15, 1958 (Pet. App. B-26), and the petition for a writ of certiorari was filed on August 11, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED.

Florida Statutes, Section 298.22 and Section 298.62 are set forth in the Appendix, *infra*, pp. 30-31.

QUESTIONS PRESENTED.

1. Whether the decision of the Court of Appeals is unconstitutional because of an erroneous determination of the function of a Federal Court to ascertain the law of the case in the exercise of diversity of citizenship jurisdiction.

2. Whether the Court of Appeals in a case based on the diversity of citizenship jurisdiction correctly exercised its function in determining the law.

3. Whether the Court of Appeals erred in determining that a drainage district in the State of Florida was without power to enter into an indemnity agreement in consideration for a mere license.

STATEMENT OF THE CASE.

Petitioner brought suit against the Respondent in the United States District Court for the Southern District of Florida, Tampa Division, for damage to Petitioner's property. Petitioner's claim was based on certain alleged tor-

tious acts of the Respondent and an indemnity agreement entered into in 1925 by the Respondent and Petitioner's predecessor in interest (R. 25). Under the terms of the indemnity agreement, the Respondent was given the right to lay culverts under the tracks of the Petitioner. The indemnity agreement provided that this right could be terminated by the railroad at any time upon 30 days notice (R. 9). The consideration for this license was the payment of $5.00 (R. 6) and the performance by the "licensee" of his covenants, among which was the indemnification of the railroad from all loss, damage, cost and expense which the railroad might sustain growing out of the installation, presence, operation, maintenance or removal of the culverts. The indemnity agreement was not the sole consideration received by Petitioner as Petitioner states in his petition (Pet. 3), nor is there any evidence or allegation that the $5.00 was mere "nominal" consideration. The indemnity agreement was not signed by the Respondent's President nor its Vice President; but was instead signed by two of the three members of the Board of Supervisors, even though places were provided for the signatures of all three superivsors (R. 21).

Respondent is a drainage district organized under the General Drainage Law of the State of Florida, Florida Statutes, Chapter 298.

On January 19, 1957, the District Court granted the Respondent's Motion to Dismiss on the grounds that, the Respondent being a drainage district organized and existing under the General Drainage Law of the State of Florida, it had no authority to bind itself as an indemnitor and could not be held liable in tort (Pet. App. B-1).

Petitioner appealed and the United States Court of Appeals for the Fifth Circuit, with a Judge dissenting, re-

versed the District Court in an Opinion rendered January 14, 1958. On petition for rehearing, the Court of Appeals in a decision rendered May 15, 1958, set aside its former opinion and confirmed the judgment of the District Court on the basis that a drainage district under the law of the State of Florida could not by contract assume a liability with which the courts and the Legislature of the State of Florida had intended that it not be burdened and the supervisors could not negate this policy by merely contracting to do so.

Respondent feels that there are sufficient authorities in the decisions of the Florida Supreme Court to determine the issues in this case.

ARGUMENT.

1. Petitioner's argument concerning an erroneous determination of the function of a federal court to ascertain state law is an attempt on its part to knock down a straw man of its own making. Petitioner purports to make a metaphysical analysis of the court's method of arriving at its decision and then place a label of "erroneous" on his self-manufactured interpretation of what the court's unspoken reasoning was. This is pure supposition and speculation. The court did not state, and it is not apparent from its opinion, which of the various methods discussed in the petition it used in reaching its decision or that it relied on any one method to the exclusion of other methods. What is apparent, however, is that the court considered all of the applicable Florida law relating to drainage districts, the law of Florida concerning an agreement of a governmental body to do an act which it was not authorized to do, and the overwhelming weight of authority in other jurisdic-

tions as to the right of a body politic to make an indemnity agreement (Pet. App. B-19-21).

2. Petitioner appears to be in doubt itself as to how the federal courts should go about determining state law "in the absence of precise state law determining the question in issue." First, it states that the federal court has an "uninhibited mandate to determine this case as an independent tribunal" (Pet. 7.)[1]. Next, it states that the federal court "should refuse to derive new state law by a process of inference from general principles of the law of the state in the same field." (Pet. 8).[2] Finally, it says that clearly the federal courts should decide the question of state law "as if they were sitting as judges of the states' highest court" (Pet. 9, n. 10).

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1. No authority is given for this statement. Furthermore, this statement is in conflict with the holding in this Court in *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, that:

> "* * * the federal court enforcing a state-created right in a diversity case is, as we said in Guaranty Trust Co. v. York, 326 U.S. 99, 108, 89 L. Ed. 2079, 2086, 65 S. Ct. 1464, 160 A.L.R. 1231, in substance 'only another court of the State.'" [p. 203].

2. As authority for this statement Petitioner cites *Bernhardt v. Polygraphic Co., supra.* No basis, however, for this statement is to be found in the majority opinion; but only in the concurring opinion of Mr. Justice Frankfurter, which on this point was not concurred in by any other Justice. Even this concurring opinion does not go as far as Petitioner's statement but only indicates the state law. The concurring opinion follows the general rule and indicates that a ruling of the Court of Appeals on state law should not be disturbed by this Court. The majority opinion is contrary to Petitioner's statement and even went so far as to refuse to give the Court of Appeals an opportunity to review the District Court's decision as to what was the law of Vermont. As stated by the majority of the Court speaking through Mr. Justice Douglas:

> "Since the federal judge making those findings is from the Vermont bar, we give special weight to his statement of what the Vermont law is." [p. 204].

Petitioner then attempts to set up by conjecture a conflict between the various United States Courts of Appeals as to the exact method of judicial cerebration in the absence of a pronouncement on the very question in issue by the state court. Petitioner then cites five cases which it claims support its view that such confusion exists.[3] None of these cases (with the possible exception of *Fisher* v. *American National Co.*, 241 F.2d 175, 177[4]) attempts to lay down any ruling as to the method of arriving at a decision in such cases. All the courts did were to place on record some indication of the method they used in those particular cases. In three of these cases it was apparently conceded by all parties that there was an absence of state law,[5] not necessarily an absence of state law on the *exact* factual situation before the court, but an absence of *relevant* state law.

As a justification for this Court invoking its jurisdiction on certiorari, Petitioner seeks to have the Court lay down a hard and fast rule as to just how the district courts

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3. *Marshessault* v. *National Grange Mutual Liability Co.*, 229 F. 2d 698 (C.A. 2d); *Herrick* v. *Sayler*, 245 F.2d 171 (C.A. 7th); *Western Spring Co.* v. *Andrews*, 229 F.2d 413 (C.A. 10th); *Standard Accident Ins. Co.* v. *New Amsterdam Cas. Co.*, 249 F.2d 847 (C.A. 7th); and *Fisher* v. *National Ins. Co.*, 241 F.2d 175 (C.A. 3rd).

4. "The Pennsylvania courts have never passed upon the precise clause involved in the instant case. That being so we are required to consider such approach to the problem as may be indicated by the Pennsylvania cases in the general field and to resort to general applicable principles to reach a decision consistent with Pennsylvania law. Continental Assurance Co. v. Conroy, 3 Cir. 1954, 209 F.2d 539; Aetna Casualty & Surety Co. v. DeMaison, 3 Cir., 1954, 213 F.2d 826."

5. *Marshessault* v. *National Grange Mutual Liability Co.*, *supra*; *Standard Accident Ins. Co.* v. *New Amsterdam Cas. Co.*, *supra*; *Western Spring Service Co.* v. *Andrews*, *supra*.

and the courts of appeals shall go about arriving at state law. This is so, even though Petitioner admits and approves of the fact that there is considerable flexibility as to such methods.[6] The subject of federal courts determining state law is not one which admits of roughshod dogmatic restrictions, but one which should be handled with considerable delicacy with consideration given to all factors. No rule could be laid down by this Court as to the method of judicial cerebration which would not promote and increase conflict between state and federal court decisions on state law. This, of course, is what this Court's decision in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, was supposed to prevent.[7] Since the various state courts have not unanimously adopted any regimen of judicial thought processes in arriving at state law in the absence of a state decision on the precise point, this Court could not lay down such a uniform procedure for the lower federal courts to follow in each of their various jurisdictions.

Court of Appeals Should Not Be Reversed on State Law.

Petitioner apparently has overlooked a clear policy of this Court which has already been established in regard to the determination of state law. This Court has quite properly exercised the utmost reluctance to pit its judgment as to state law against those of the lower federal courts. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667; *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S.

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6. Petitioner's Brief, p. 8, n. 8.

7. "The nub of the policy that underlies Erie R. Co. v. Tompkins is that for the same transaction the accident of a suit by a nonresident litigant in a federal court instead of in a state court a block away should not lead to a substantially different result." *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109. Quoted with approval in *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 204.

530; *Propper* v. *Clark*, 337 U.S. 472; *Spiegel's Estate* v. *Commissioner of Internal Revenue*, 335 U.S. 701; *Steel* v. *General Mills*, 329 U.S. 433; *Hillsborough Township* v. *Cromwell*, 326 U.S. 620; *Helvering* v. *Stuart*, 317 U.S. 154; *MacGregor* v. *State Mut. Assur. Co.*, 315 U.S. 280; *Compania General De Tabacos* v. *Collector of Internal Revenue*, 279 U.S. 306. This is particularly so where the state law on the precise point is not clear, or when the opinion of the Court of Appeals is in agreement with that of the District Court.[8] As held by the Court in *MacGregor* v. *State Mut. Life Assur. Co.*, *supra*:

> "No decision of the Supreme Court of Michigan, or of any other court of that State, construing the relevant Michigan law has been brought to our attention. In the absence of such guidance, we shall leave undisturbed the interpretation placed upon purely local law by a Michigan federal judge of long experience and by three circuit judges whose circuit includes Michigan." [p. 281].

Petitioner's right to a reversal in this Court is specifically negated by the Court's holding in *Helvering* v. *Stuart*, *supra*, and *Spiegel's Estate* v. *Commissioner*, *supra*: In the first of these cases it was stated concerning the view of the Court of Appeals:

> "This conclusion does not spring from a statute of that state nor even from a clear or satisfying line of decisions. It is, however, the reasoned judgment

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8. As shown in the report of a companion case to the case at bar, *Seaboard Airline Railroad Co.* v. *Sarasota-Fruitville Drainage District*, 255 F.2d 626, the same question of state law was presented to another United States District Judge; and he too made the same ruling as to the Florida law. The trial judges in the two cases have a combined experience of over three score years and ten on both state and federal benches in an area where drainage districts are perhaps more numerous and widespread than any place in the world.

> of the circuit which includes Illinois in which a judge of long experience in the jurisprudence of that state participated. Without a definite conviction of error in the conclusion, this Court will not reverse that judgment." [p. 163].

In the latter Mr. Justice Black, speaking for the majority of the Court, held:

> "It would be wholly unprofitable for us to analyze Illinois cases on the point here urged. It is sufficient for us to say that we think reasonable arguments can be made based on Illinois cases to support a determination of this question either for or against the petitioner's contention. Under these circumstances we will follow our general policy and leave undisturbed this Court of Appeals holding on a question of State law." [p. 708].

In *Propper* v. *Clark*, 337 U.S. 472, the very method was used by the Second Circuit which the Petitioner asserts, with criticism, was used by the Court of Appeals in the case at bar. In that case there was no holding of the New York courts on the "precise issue of state law involved," and the Court of Appeals turned to state cases in *analogous* situations. In affirming the Court of Appeals' decision, Mr. Justice Reed, speaking for a majority of the Court, stated:

> "In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." [p. 486].

In probably the most recent pronouncement of the Court on this subject, *Skelly Oil Co.* v. *Phillips Petroleum Co.*, *supra*, the majority of the Court speaking through Mr. Justice Frankfurter made the unequivocal statement that:

"* * * we do not reexamine the local law as applied by the lower courts." [p. 674].

Court of Appeals in Accord with State Law.

3. Regardless of which metaphysical method Petitioner believes to be the proper one, the opinion and decision of the Court of Appeals would meet its requirements. There is also little question that the Supreme Court of the State of Florida would have held exactly as did the District Court and the Court of Appeals. The Legislature and the Supreme Court of Florida have given drainage districts in that state a favored place in the law, even to the extent of allowing such drainage districts to tax the lands of the state itself.[9] Certainly the same Court which handed down the decision of *Rabin* v. *Lake Worth Drainage District*, Fla., 82 So. 2d 353, in September of 1955 (which held that a drainage district could not be compelled to respond in damages for a tort or forced to levy taxes for this purpose because the power of taxation of the district was limited strictly to the improvement and maintenance of the district and could not be exercised for any other purpose)[10] would have felt bound to hold that the Florida Legislature did not contemplate that such a district could be compelled to respond in damages resulting from a tort, just because two supervisors by contract agreed that

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9. *State* v. *Warren*, Fla., 57 So.2d 337; *State* v. *Caldwell*, 160 Fla. 355, 35 So.2d 642; *State* v. *Everglades Drainage District*, 155 Fla. 403, 20 So.2d 397; *State* v. *Lake Worth Drainage District*, 155 Fla. 408, 20 So.2d 399.

10. The policy of the State of Florida that its drainage districts should not be compelled to expend their tax monies in compensation for personal injuries or property damages, is based not only on the doctrine of sovereign immunity but on the limited and special character of a drainage district which is inherent in its creation.

the district could be so compelled. The Florida Court would have felt constrained to look to its previous decisions concerning the powers of the state's various political subdivisions and agencies,[11] particularly those of drainage districts,[12] in the absence of express statutory authority. It would have considered the special nature of a drainage district, its limited and definite purpose, limited authority and

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11. *Molwin Investment Co.* v. *Turner*, 123 Fla. 505, 167 So. 33; *White* v. *Crandon*, 116 Fla. 162, 156 So. 303; *Williams* v. *Town of Dunnellon*, 125 Fla. 114, 169 So. 631; *Hopkins* v. *Special Road & Bridge District No. 4*, 73 Fla. 247, 74 So. 310; *First National Bank of Jacksonville* v. *Duval County*, 45 Fla. 496, 34 So. 894.

12. *Halifax Drainage District of Volusia County* v. *State*, 134 Fla. 471, 185 So. 123; *Forbes Pioneer Boat Line* v. *Board of Commissioners of Everglades Drainage District*, 77 Fla. 742, 82 So. 346; *State ex rel. Davis* v. *Jumper Creek Drainage District*, 153 Fla. 451, 14 So.2d 900.

As stated in *Forbes Pioneer Boat Line* v. *Board of Commissioners of Everglades Drainage District, supra*:

> "A careful examination of the acts of the Legislature does not reveal any *express* power or authority granted the defendant in error to levy a toll upon boats passing through the lock in question. In much detail have the various powers been set out. The careful enumeration of these powers is an indication that this board was not to have any others than those enumerated. 'Expressio unius est exclusio alterius.'" [Emphasis supplied] [p. 351].

In *State ex rel. Davis* v. *Jumper Creek Drainage District, supra*, it was held that the district had no power to discharge a particular landowner's property from further taxation in consideration of full payment of the *total* tax assessed against it, so as to prevent further assessments (not, of course, in excess of the assessed benefit). Referring to the General Drainage Law, the court stated:

> "* * * The creative statute is a grant of power and the supervisors of the district must look *entirely* to the statute for their authority. All persons and their privies dealing with the supervisors are charged with notice of the limitation of authority vested in the officials." [Emphasis supplied].

limited power of taxation.[13] It would have considered the right Respondent obtained under the indemnity agreement in the light of the distinguishment it made between a "license" and an "easement" in *Burdine* v. *Sewell*, 92 Fla. 375, 109 So. 648, and measured it against the types of interests in land which the Respondent's supervisors were authorized to acquire.[14] Finally, the Florida Court would look at Petitioner's argument that an unauthorized act or a prohibited result can be compelled through the medium of a contract, against its decisions in *State ex rel. Davis* v. *Jumper Creek Drainage District*, 153 Fla. 451, 14 So. 2d 900[15]; *First National Bank of Jacksonville* v. *Duval County*, Fla. 633, 149 So. 203.

45 Fla. 496, 34 So. 894;[16] *Brumby* v. *City of Clearwater*, 108

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13. *Halifax Drainage District of Volusia County* v. *State*, *supra*; *State ex rel. Root* v. *Crandon*, 115 Fla. 153, 155 So. 667; *Hardee* v. *State*, 83 Fla. 544, 91 So. 909; *Forbes Pioneer Boat Line* v. *Board of Commissioners of Everglades Drainage District*, *supra*; *Arundel Corp.* v. *Griffin*, 89 Fla. 128, 103 So. 422; 11 Fla. Jur., *Drainage and Drainage Districts*, Sec. 9.

14. Fla. Stat., §§ 298.22, 298.62.

15. See note 12, *supra*.

16. There the defendant county was without sufficient funds to pay its warrants. In order to have its warrants honored it was agreed between the county and the bank that if the bank would cash the warrants, the county would repay it with interest. The bank cashed the warrants, but when the time came for it to be repaid the county refused to pay the interest as agreed. The Florida Supreme Court sustained the county and based its decision upon the fact that the statutes gave the county no authority to pay interest on county warrants, and in effect held the contractual feature of the case immaterial, *i. e.*, if the county could do it by contract, authority had to be found for the county to do the same act *in the absence of any contract*. The Florida court dismissed the argument concerning the agreement with the following statement:

> "To permit the county commissioners to evade the requirements of these sections, by sanctioning the contract

Petitioner constantly refers to the absence of state law on the point in issue. Respondent strenuously takes issue with this premise and for this reason has left this phrase out of questions 1 and 2 under the heading of "Questions Presented" in this brief. It is true that the Florida court has never ruled on the exact self-same factual situation at bar, but on appeal it is rare to find a case which precisely coincides with the facts then before the Court. There is, however, ample state law which, when properly and logically applied to the facts herein, will produce the same decision that the District Court and the Court of Appeals reached. It is not necessary to make "new" Florida law, but merely to logically apply old recognized principles of Florida law to a new set of factual details.

Since the General Drainage Law of the State of Florida (the organic act of the Respondent) did not give Respondent the power to acquire mere licenses in land nor to execute indemnity agreements, all that was necessary was the application of the Florida law that the supervisors of drainage districts must look *entirely* to the statute for their authority[17] and the careful enumeration of the super-

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declared upon in this case, would be to enable them to fix upon the county the burdens of a refunding of the county indebtedness at a rate of interest to be fixed by themselves, without imposing upon them the duty of submitting to the people at an election the question of the propriety of funding the indebtedness, and the rate of interest to be paid thereon. While the contract made with plaintiff may have been wise from a business point of view, tending as it did, to sustain the credit of the county, we have been unable to find a statute granting the power to make it, or granting any other power from which we can clearly imply the one here attempted to be exercised." [p. 895].

17. *Forbes Pioneer Boat Line* v. *Board of Commissioners of Everglades Drainage District, supra;* and *State ex rel. Davis* v. *Jumper Creek Drainage District, supra.*

visors' powers in the statute amounts to a prohibition of

any other powers.[18] Since the ultimate result of Petitioner's action would be to require Respondent to tax its landowners a sum in excess of $28,000.00 for property damage incurred by another as the result of one of its employee's negligence without any corresponding or equal benefit, all that would be necessary would be to invoke the doctrine of the Florida court and the Florida Legislature that drainage districts shall not be forced to respond in damages for the negligence of their employees and their landowners cannot be taxed except when directly tied into a benefit to the land.[19] Since it is admitted by all concerned that the Respondent could not be held accountable for its torts (*a fortiori*, the torts of others or Acts of God), nothing more was necessary than to look to the Florida decisions that a Florida governmental body's authority to do an act or its

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18. *Forbes Pioneer Boat Line* v. *Board of Commissioners of Everglades Drainage District, supra.*

19. *Arundel Corp.* v. *Griffin*, 89 Fla. 128, 103 So. 422; and *Rabin* v. *Lake Worth Drainage District*, Fla., 82 So.2d 353. As the Florida court stated in the *Rabin* case:

> "Another allied question is inherent in this record, that is the practical problem of collecting. If the appellant were held to have the constitutional right to proceed and he obtained a judgment, how would he go about collecting it? The district has the power only to assess against lands within its boundaries assessments to accomplish an over-all drainage operation to make the lands within the whole area cultivatable and keep them so. The assessments for main and subsidiary canals are made against the individual parcels of lands according to the benefit each parcel will receive from the project as a whole. Hearings are conducted so that any property owner aggrieved by the assessment may be heard. The financing of the improvement is based on the total assessment, the obligation undertaken to construct the project is discharged from the assessments paid. How could the district be coerced to pay any judgment obtained in a tort action except on the theory that by the commission of the tort the lands in the district were benefited? Campbell v. State ex rel. Garrett, 133 Fla. 638, 183 So. 340. This is so nebulous as not to warrant further exploration." [p. 355].

responsibility, pursuant to a contract, would be the same as if there was no contract.[20]

Petitioner does not attempt to deny any of these principles nor even to evade them. Instead it relies on what it terms an "established trend of Florida law" regarding the doctrine of sovereign immunity. Although the immunity of a drainage district is based on the very practical fact that no tax can be levied to pay for property damage or personal injury[21] as well as on the historical doctrine of sovereign immunity; we will momentarily comment on these cases. Instead of these cases reflecting a new "trend" of the Florida court, they actually amount to very little except a return to the practical result of the holding in the first case listed in the so-called "trend,"[22] a case 35 years old. It is also to be noted that, with the exception of two cases decided in 1941, all of these cases are ones involving cities, which have an entirely different rule involving immunity and which is not based purely on the doctrine of sovereign immunity.

In regard to the two cases decided in 1941, to wit: *State Road Department* v. *Tharpe*, 146 Fla. 754, 1 So.2d 868 and *State Road Department* v. *Bender*, 147 Fla. 15,

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20. *State ex rel. Davis* v. *Jumper Creek Drainage District, supra; First National Bank of Jacksonville* v. *Duval County, supra; Brumby* v. *City of Clearwater, supra.*

21. *Arundel Corp.* v. *Griffin, supra*, and *Rabin* v. *Lake Worth Drainage District, supra.*

22. In 1923 the Florida court held that the operation of a fire truck was not a governmental function of the city of Tallahassee in order to allow recovery against the city, *Kaufman* v. *City of Tallahassee*, 84 Fla. 634, 94 So. 697. It is submitted that the practical effect of the Florida court's holding in the last case of this so-called "trend", *Hargrove* v. *Town of Cocoa Beach*, Fla., 96 So.2d 130, was but a very short march down the road of municipal liability from the *Kaufman* case (if at all).

2 So.2d 298; both of these cases were before the Florida court when it rendered its clear decision on the immunity of drainage districts in the case of *Rabin* v. *Lake Worth Drainage District, supra.* The Florida court, however, rejected, *as applied to drainage districts,* the theory of the basis of the recovery against the State Road Department in those cases, to wit: Recovery for the unlawful taking of property without compensation.

If Petitioner attempts to set out the nine cases listed on p. 10 of his Brief as representing a "trend" which included drainage districts organized under the General Drainage Law of the State of Florida, then it will also have to admit that this "trend" was truncated in September of 1955 when the Florida court handed down its opinion in *Rabin* v. *Lake Worth Drainage District, supra,* which clearly and without equivocation sets out the immunity of such drainage districts. The case of *Hargrove* v. *Town of Cocoa Beach, supra,* would have no effect on the decision in the *Rabin* case, since the court was there quite careful to limit its holding to municipal corporations. There was no question there as to the necessity that the city's tax be directly tied into a benefit to the land as is the case with a drainage district.

Hohensee Case.

The only other authority on which Petitioner relies is the case of *H. Hohensee Construction Co.* v. *Chicago, M., St. P. & P. Ry. Co.,* 218 Wis. 390, 261 N.W. 242. Petitioner's phraseology in regard to the holding in this case would lead one to believe that it involved the "power of a drainage district" and concerned "drainage district law." There was no question at all concerning drainage districts or drainage district law in the *Hohensee* case, and we are certain that Petitioner did not intend to so imply. The

Hohensee case concerns a city, the city of Milwaukee, and not a governmental body of such circumscribed authority as a drainage district. In addition, the city of Milwaukee, as was pointed out by the Wisconsin court, had "power to act for its *commercial* benefit" and could "contract for the doing of public work." Certainly, Respondent was given no such broad powers under the General Drainage Law. A city has general powers of government, it has general powers of taxation, and its creating acts usually contain such omnibus clauses as "police power," "general welfare" and similar clauses. This is not so with a drainage district. The powers of a drainage district have been very meticulously set out, and the careful enumeration of those powers precludes any others.[23]

Petitioner (Pet. 11, n. 12) alleges that the later case of *Pohland* v. *City of Sheboygan*, 251 Wis. 20, 27 N.W. 2d 736, supports the *Hohensee* case. The opposite, however, is true; since the *Hohensee* case was so brusquely treated in the *Pohland* case as to cause considerable doubt whether it has any effect at all, even in Wisconsin.

The issue in the *Pohland* case, which was decided 12 years after the *Hohensee* case, was the same as that in the case at bar—whether or not the immunity from tort liability could be waived by contract. The city there was operating a recreation park and had taken out a liability insurance policy covering the operation of the park. There was a statute authorizing the city to take out such a policy to protect the city, its officers and its employees from liability. Apparently the policy contained an express agreement that neither the insurance company nor the city would assert the city's immunity to suits for its neg-

23. *Forbes Pioneer Boat Line* v. *Board of Commissioners of Everglades Drainage District, supra.*

ligence. The Plaintiff was injured at the park through the alleged negligence of the city and brought suit against the city and the insurer. Both demurred on the grounds of the city's immunity and both demurrers were sustained. Strangely enough, the lower court relied on the *Hohensee* case in making its decision. Although the opinion in the *Hohensee* case clearly gives two situations where a city may enter an indemnity contract: First, when such an agreement is necessary to its protection; and second, when such an agreement is to its advantage in connection with any contract that it has express power to make; the lower court cited the case for the proposition that the city had *no* right to make such a contract *unless necessary for its protection.* In doing so the lower court completely ignored the second of the two situations, but the Supreme Court of Wisconsin apparently approved this holding.[24] Even though cities have much broader powers than drainage districts,[25] and even though those powers are more liberally construed,[26] the Wisconsin court held, in regard

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24. As stated by the Wisconsin court:

"The Circuit Court ruled that the city had *no right* to make an indemnity contract *unless necessary* for its protection, citing *Hohensee Construction Co.* v. *Chicago, Milwaukee, St. P. & P. Ry. Co.*, 218 Wis. 390, 261 N.W. 242, which he says by an implication so holds. While that case only holds that a City may make an indemnity contract when for its benefit or advantage, we think *his* holding is correct. No statutory city power is pointed out, no adjudicated cases are pointed out, as authority in support of the theory that the city can make an indemnity contract except so far as is *necessary* for its own protection. * * * But *we perceive no authority for making a contract to indemnify any one but the city or its employees when the latter is authorized by statute.*" [Emphasis supplied].

25. *Tri-City Fresh Water Supply District No. 2 of Harris County* v. *Mann*, 135 Tex. 280, 142 S.W.2d 945.

26. *White* v. *Crandon*, 116 Fla. 162, 156 So. 303; *Williams* v. *Town of Dunnellon*, 125 Fla. 114, 169 So. 631; *Hopkins* v. *Special Road & Bridge District No. 4*, 73 Fla. 247, 74 So. 310; *Tax Factors*

to plaintiff's contention that the city and insurance company were estopped to assert immunity because of the agreement:

> "As to the City, the City has no power except such as is conferred on it by statute, and such as is *necessary* to the exercise of a power so conferred. No statute is pointed out as conferring the power to make the agreement referred to, and none is pointed out from which the power to make that agreement is *necessary*. We know of no statute conferring or authorizing the exercise of such power. No adjudicated cases are cited as authorizing such power. We consider that the proposition contended for is not tenable." [Emphasis supplied].

Authorities from Other Jurisdictions.

Regardless of the rule in Wisconsin, it is clear that the overwhelming weight of authority is to the effect that governmental bodies such as a drainage district have no authority, unless clearly granted by statute, to become a guarantor or an indemnitor, *Nashville* v. *Sutherland*, 92 Tenn. 335, 21 S.W. 674; *Becker* v. *Keokuk Water Works*, 79 Iowa 419; *People* v. *Dibble*, 189 N.Y.S. 29; *Vaughman* v. *Town of Waterloo*, 14 Ind. App. 649, 43 N.E. 476; *Davenport* v. *Pitt Cty. Drainage District No. 2*, 220 N.C. 237, 17 S.E.2d 1; *Wheeler* v. *Sault Ste. Marie*, 116 Mich. 338, 129 N.W. 685; *American Malleables* v. *Town of Bloomfield*, N. J., 81 Atl. 500, Aff. 85 Atl. 167.

One of the leading cases on this point is *Nashville* v. *Sutherland*, *supra*. The facts in that case are very similar to those which are now before us, except that the City of Nashville was liable for its negligence whereas Respond-

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v. *Marin County*, 20 Cal. App. 2d 79, 66 P.2d 666; *Lancaster* v. *Atchison County*, 352 Mo. 1039, 180 S.W.2d 706.

ent is not. There the plaintiff, as did the Petitioner here, conveyed to the City of Nashville a right-of-way to lay a pipe for drainage purposes through their lumber yard to the river. As part of the consideration for this right the city agreed to place on the pipe a suitable value so as to prevent, in case of a high rise in the river, the flowing of water from the river back through the pipe into the premises of plaintiff. The pipe was laid and the valve constructed. Subsequently a rise in the river caused an overflow through the valve in the pipe and submerged the property of the plaintiff. Judgment was recovered against the City in the lower court. In reversing the lower court's decision, the Supreme Court of Tennessee stated:

> "It was within the power of the officers of the City to agree to put in any kind of sewer and valve (had they done so) as part consideration for the grant of right-of-way; but they could not, in the absence of charter power, bind the City by a guaranty[27] that they or it would put in such pipe or valve as would prevent overflow, to the injury or damage of owners, and thus make the City insurors of property against such injury. The City is only liable for absence of reasonable care and skill in the execution of such work, and its officers *cannot lawfully contract to bind it beyond this, without express charter power*, not claimed or shown in this record to exist."
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> "The board of public works and affairs *could bind the city by contract so far, and no farther than it would have been bound by law;* that is, to ordinary skill and care in the execution of the work agreed to be done. So, as is well said in the same argument of counsel: 'If they had undertaken to indemnify Sutherland & Co. against loss resulting from defendant's

27. Actually the agreement amounted to an indemnification rather than a guaranty.

negligence in the execution of the work, this would have been valid. For this much the city is bound by law, independent of any contract provision. But, instead of limiting the city's obligation as fixed by law, the Board, by contract, attempted to make it liable for what, in the absence of such a contract, it is not pretended it could have been liable. The inhabitants of the City of Nashville—those people who live within the corporate limits—are its corporators. *Their liability, as well as their rights, are fixed by law; and no more can the agents of these corporators increase their liabilities than they can deprive them of their rights.* The Legislature of the state has deemed it wise policy to charge municipal corporations with a certain liability. All who deal with these corporations are bound to know the extent of this liability, and, when the corporation's agents exceed it, *they may be guilty* of a personal wrong, but cannot subject the corporation they represent to damages on that account.'" [Emphasis supplied].

A somewhat similar type of contract, this time of a drainage district, was held invalid in *Davenport* v. *Pitt County Drainage District No. 2, supra*, but through a different approach.

In *Vaughtman* v. *Town of Waterloo, supra*, it was held that a town did not have authority to indemnify even its own marshal for enforcing one of its own ordinances. There the Town of Waterloo passed an ordinance which made it a misdemeanor for a person to carry passengers in a vehicle for hire without a license. The ordinance also made it the duty of the town marshal to arrest all persons violating the ordinance. One Crayens violated the ordinance. Before making the arrest, however, the marshal reported to the town's board of trustees that Crayens stated he would resist the enforcement of the ordinance. Thereupon, the town by its board of trustees, duly promised and

agreed with the marshal that, if he would make the arrest, the town would prosecute the person, would save the marshal harmless, would pay him all cost, trouble and expense which he might be put to by reason of the commencing of the actions, and that if Crayens sued him for making the arrest that the town would defend him and pay all cost and damages which he might incur in said arrest. Relying on such agreement the marshal made the arrest, but the town failed to defend him as it promised. The Indiana Court, nevertheless, held that the town had no power to enter into such an agreement and pointed out that a town's power is only such as is *expressly* granted by the law under which it is created.

In *American Malleables* v. *Town of Bloomfield, supra,* the Town of Bloomfield entered into a contract with a railroad whereby the railroad agreed to elevate its tracks. The contract called for the city to vacate a certain street and for the preservation of an industrial siding on plaintiff's land at the same elevation. The plaintiff with this understanding permitted the railroad to build a depot on its (the plaintiff's) land in furtherance of the contract, made no objections to the vacating of the street abutting its land, and permitted the removal of the existing siding. The town and the railroad subsequently modified the contract so as to omit the industrial siding which was to be on the plaintiff's property. Before agreeing to this the railroad had the town agree in the amended contract to indemnify it and save it harmless from all claims, demands, etc., of the plaintiff by virtue of the elimination of the industrial siding. It was held that the town had no power to enter into such a contract.

The argument that an unauthorized means may be used to obtain an authorized end was presented and re-

jected in the case of *Lynchburg and R. St. Ry. Co.* v. *Dameron, supra,* and *Wheeler* v. *City of Sault Ste. Marie, supra.*

The City of Lynchburg in *Lynchburg and R. St. Ry. Co.* v. *Dameron* was expressly authorized to rent, purchase, lease "or otherwise acquire" suitable works, machinery, etc., for the generation of electricity for the use of the city and its inhabitants. To accomplish this end the city entered into a contract with the railroad under which the railroad was to furnish electric lights for the city. In order to render the services contracted for, the railroad would have to erect a new power station, which required financing by the issuance of bonds. As part of the agreement the city agreed to guarantee the payment of the bonds in order to facilitate their sale. The question involved was whether the city had the authority to make such guarantee.

The railroad argued that since the city was expressly authorized to acquire works, machinery, etc., for the generation of electricity for itself and its inhabitants, that therefore, the city had the implied or incidental power to secure the same results indirectly by aiding the railroad in so doing; instead of expending money for that purpose it could lend the credit of the city to the railroad, especially where it took security to protect it from loss. The court stated:

> "The general rule is that the officers or governing body in a corporation, whether public or private, have no implied power to bind it as the surety, indorser, or guarantor for another in a business in which it has no interest. Such a transaction is not within the scope of its business.
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> "* * * The investment or expenditure of money, and the loaning of the credit of the principal, under the rule of mandate, are not governed by the same

rule. The open and direct appropriation and expenditure of money by the officers of a municipal corporation *has nothing in common with the contingent and long-continuing contract of suretyship.*

"It is clear, upon principle, that a municipal corporation, which has authority to expend corporate funds in doing a particular act, cannot lend its credit to another, to enable it to do the same act, without legislative authority. * * *" [Emphasis supplied].

In *Wheeler* v. *City of Sault Ste. Marie*, 164 Mich. 338, 129 N.W. 685, an indemnity agreement similar to the one at bar was in question. There the city desired to widen a street upon which the plaintiff's property fronted. In consideration of his conveyance of a strip of his land for this purpose the city agreed to move back the plaintiff's store building a distance of ten to twelve feet and place the same in the new location in as good a condition as before. Also the city agreed to save the plaintiff harmless and assumed all risk in moving the building both as to persons and property. The plaintiff attempted to get specific performance of the agreement, but the city defended on the grounds that it had no authority to make such a contract. Holding the city had no authority to enter into such a contract, the court said:

"* * * *The contract cannot be sustained on the ground that it is for the purpose of acquiring property for the public use.* The city undoubtedly has a right to acquire the strip of land which complainant agreed to convey, but when it decides to do so, it must resort to some of the modes of acquisition pointed out by the statute or its charter. *To acquire the property in question, it is unnecessary to enter into such a contract. It can be purchased by agreement or condemned and a money consideration paid for it. It has not the power to acquire property for the public use*

by entering into contracts of this character. Penley et al. v. City of Auburn, 85 Me. 278, 27 Atl. 158, 21 L.R.A. 657; *Stewart v. City of Council Bluffs*, 50 Iowa 668.

"Another equally cogent reason suggests itself why the city could not legally enter into the proposed contract. By accepting the terms of the contract, it would undertake to carry a casualty risk during the time the building was being moved, and might subject the city to a great loss in the event that the building should collapse. It would likewise compel the city to carry a personal indemnity risk for the employees while engaged in the work. The carrying of casualty and indemnity risks for individuals or other corporations is clearly beyond the power of the defendant city. *Nashville v. Sutherland & Co.*, 92 Tenn. 335, 21 S.W. 674, 19 L.R.A. 619, 36 Am. St. Rep. 88; *Carter v. City of Dubuque*, 35 Iowa 416; *Blake et al. v. City of Macon*, 53 Ga. 172.

"The proposed contract was *ultra vires*, and the trial court was right in refusing to enforce it." [Emphasis supplied].

Not only did the Court of Appeals examine and correctly apply all the applicable Florida law to the case at bar, but it looked to the law of other jurisdictions as suggested by Petitioner and correctly found that its conclusion was "in accord with the weight of authority in other jurisdictions." (Pet. App. B-21).

The contract which Petitioner attempts to enforce here illustrates the reasons for the necessity of the rules that the officers of drainage districts have only such powers as are granted to them by statute and that governmental bodies cannot execute indemnity agreements. The contract here was nothing more than a gamble on the part of the supervisors. It was a gamble with unlimited stakes

as far as the drainage district was concerned. There could have been such an accident[28] that, if the contract was enforced, it could have bankrupted the district. In exchange for this long continuing contingent liability of unlimited amount, covering not only the district's negligence, but the railroad's negligence and anyone else's negligence, as well as Acts of God; the district received, as a matter of *right*, *only a 30-day* privilege to cross Petitioner's tracks. The indemnity agreement specifically provided that this privilege could be cancelled *by the railroad* at any time merely by giving 30 days notice (R. 9). It would be unconscionable to allow two supervisors to risk so much for so little. If an easement could not have been purchased, it could have been condemned for a small sum. Certainly the cost would not have been enough to warrant the landowners' property being placed in jeopardy.

No authority is given for a drainage district to acquire a mere "license" in any of the powers granted a drainage district; and, as the Florida Supreme Court held in *Forbes Pioneer Boat Line* v. *Board of Commissioners Everglades Drainage District*, 77 Fla. 742, 82 So. 346, the particularity with which these powers are set out shows that the Legislature intended the supervisors to have no others. This was not a mere oversight on the part of the legislative draftsmen. Drainage districts are created to exist for long periods of time, usually for perpetuity. The needs for right-of-ways are not temporary needs. What good would it be for a drainage district to acquire a mere "license" over a party's land? Usually many miles of ditches are dug, both upstream and downstream from a particular person's property. To merely have a "license" to carry

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28. The indemnity agreement does not have any liability limit.

water through a person's property for only as long as he is agreeable; would be worse and would cause more trouble, than not having any right at all. What would happen when the person decides to change his mind and terminate the "license"? What would happen here if the railroad exercised its 30 day cancellation clause? What if this election was exercised at the beginning of the traditional rainy season in southern Florida? A new ditch could not be dug within 30 days nor could condemnation proceedings be completed. Not only by applying the rules of statutory construction, but by applying the rules of common sense, this was not the type of interest that a drainage district was authorized to acquire, regardless of the method of acquisition and regardless of the type or nature of the consideration given.

The promise made by Respondent in the present case in consideration for the "license" not only was unauthorized and *ultra vires*, but it was "*unlawful.*" It is admitted that the Respondent is not to be liable under the Law of the State of Florida for its negligence. Since it cannot be liable for its own negligence, it must also be admitted that it could not be liable for someone else's negligence. *A fortiori*, it must be admitted it could not be held liable for an unavoidable accident or an Act of God. Admitting this, any attempt on the part of two supervisors of the drainage district to make it liable in any of these instances must be in contravention of the law of the State of Florida, and, therefore, an unlawful act. The indemnity agreement on the part of two of the three supervisors was an attempt to waive an immunity which previously existed and an attempt to assume a liability which had not previously existed.

The fact that such an attempt was made through the mechanics of a contract does not prevent it from being

unlawful. As the Florida court held in *First National Bank of Jacksonville* v. *Duval County*, *supra*, governmental officials cannot evade the effect of the Law through the sanction of a contract. To so allow would be to place them beyond and above the Law. A contract relationship could always be obtained as a guise to cover the unauthorized assumption of authority.

The Florida Supreme Court in the cases of *Arundel Corp* v. *Griffin*, *supra*, and *Rabin* v. *Lake Worth Drainage District*, *supra*, have made it clear that it was not the form of the suit that was abhorrent, but, more important, the actual physical circumstances which gave rise to the suit —whatever its form. These cases show that the danger from which the State of Florida wishes to protect its drainage districts is not the institution of a suit plead *ex delicto* but the *payment of damages*. It was not the will of the Legislature of the State of Florida that Respondent merely be immune to a suit *ex delicto*, but that it should be protected from paying the damages arising out of injury to person or property, regardless of the nature of the suit. It is not the form of the pleadings that provides the danger, but the characteristics of a suit arising out of damage to person or property. The policy of the State of Florida in this regard is for the purpose of preventing a particular harm, and is practical, not theoretical nor technical in nature. The harm to the Respondent's landowners will be just as great whether Petitioner comes into court suing for the tort or on its contract. Since the physical facts giving rise to the suit and the effect thereof will be the same in each case, each is equally prohibited.

The immunity from being forced to respond in damages for injury to person or property is that of the landowners of the district. It is not for the benefit of the board of supervisors; and since it is not theirs, it is not theirs to

give away or waive. This is in accord with the general rule that governmental officials are not allowed to waive their constituents' immunity to being taxed to pay for property or personal injury damages, *Adams* v. *City of New Haven*, 131 Conn. 552, 41 A.2d 111; *Lambert* v. *City of New Haven*, 129 Conn. 647, 30 A.2d 923; *Nashville Trust Co.* v. *City of Nashville*, 182 Tenn. 545, 188 S.W.2d 342; *Nashville* v. *Sutherland*, 92 Tenn. 335, 21 S.W. 674.

CONCLUSION.

The only question presented in the Petition is one of state law. There is no federal or constitutional issue presented. It is not often that this Court is called upon to review a question of state law which has been so thoroughly considered by the lower federal courts. The question was argued before two District Judges, both of whom decided the question in favor of Respondent. Not only was the question considered by the Court of Appeals in two separate cases, but was also considered on petition for rehearing, with the final outcome in both cases in favor of Respondent. The holding of the Court of Appeals is in complete harmony with the decisions of the Florida Supreme Court concerning governmental bodies, particularly those decisions involving drainage districts; and is in accord with the overwhelming weight of authority in other jurisdictions.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

CHARLES E. EARLY,
Attorney for Respondent.

APPENDIX

1. Fla. Stat., § 298.22:

"In order to effect the drainage, protection and reclamation of the land in the district subject to tax, the board of supervisors may clean out, straighten, open up, widen, or change the course and flow, alter or deepen any canal, ditch, drain, river, water-course, or natural stream; and concentrate, divert or divide the flow of water in or out of said district; construct and maintain main and lateral ditches, canals, levees, dikes, dams, sluices, revetments, reservoirs, holding basins, floodways, pumping stations and syphons, and may connect same, or any of them, with any canals, drains, ditches, levees or other works that may have been heretofore, or which may be hereafter constructed by the trustees of the internal improvement fund or the board of drainage commissioners of the state, and with any natural stream, lake or water-course in or adjacent to said district, build and construct any other works and improvements deemed necessary to preserve and maintain the works in or out of said district; acquire, construct, operate, maintain, use, sell, convey, transfer or otherwise provide for pumping stations, including pumping machinery, motive equipment, electric lines and all appurtenant or auxiliary machines, devices or equipment; contract for the purchase, construction, operation, maintenance, use, sale, conveyance and transfer of the said pumping stations, machinery, motive equipment, electric lines and appurtenant equipment, including the purchase of electric power and energy for the operation of the same; construct or enlarge, or cause to be constructed or enlarged, any and all bridges that may be needed in or out of said district, across any drain, ditch, canal, floodway, holding basin, excavation, public highway, railroad right of way, track, grade, fill

or cut; construct roadways over levees and embankments; construct any and all of said works and improvements across, through or over any public highway, railroad right of way, track, grade, fill or cut, in or out of said district; remove any fence, building or other improvements, in or out of said district; and shall have the right to hold, control and acquire by donation or purchase and if need be, condemn any land, easement, railroad right of way, sluice, reservoir, holding basin or franchise, in or out of said district, for right of way, holding basin for any of the purposes herein provided, or for material to be used in constructing and maintaining said works and improvements for drainage, protecting and reclaiming the lands in said district. Said board of supervisors also may develop, hold and control all water power created by the construction of works of said district, and may construct and maintain hydro-electric power plants for the purpose of developing such power for the use of said district, use any funds in the treasury of said district not otherwise appropriated for the construction and maintenance of such power plants; and the said board of supervisors may lease any surplus power in excess of that required for the uses of said district, and the proceeds of such leases shall be paid into the treasury of said district. Said board also may condemn or acquire, by purchase or grant, for the use of the district, any land or property within or without said district not acquired or condemned by the court on the report of the commissioners assessing benefits and damages, and shall follow the procedure set out in chapter 73."

2. Fla. Stat., § 298.62:

"Any and all drainage and sub-drainage districts created or organized under the laws of the state may acquire by gift, purchase, exchange, donation or condemnation, any lands within or without the said district for canal right of ways, or for other general purposes of the said district, and if acquired by condemnation the procedure shall be as prescribed in chapter 73."